United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2249.

No. 18, SPECIAL CALENDAR.

796

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND WILLIAM V. JUDSON, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

UNITED STATES OF AMERICA *EX RELATIONE* HELEN STUART, WIDOW, AND HELEN GERTRUDE STUART, INFANT CHILD OF WALTER J. STUART, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 11, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

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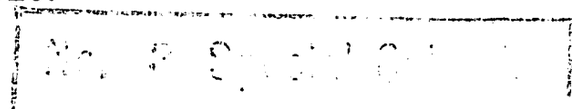

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 30, 1910.

[9466]

In the Court of Appeals of the District of Columbia.

No. 2249.

CUNO H. RUDOLPH et al., Appellants,
vs.
U. S. OF A. ex Rel. HELEN STUART et al.

a Supreme Court of the District of Columbia.

At Law. No. 53047.

UNITED STATES OF AMERICA ex Relatione HELEN STUART, Widow, and Helen Gertrude Stuart, Infant Child, of Walter J. Stuart, Deceased, Plaintiff,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON and WILLIAM V. JUDSON, Commissioners of the District of Columbia, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Writ of Mandamus.*

Filed November 10, 1910.

In the Supreme Court of the District of Columbia, Holding a Law Term.

At Law. No. 53047.

UNITED STATES OF AMERICA ex Relatione HELEN STUART, Widow, and Helen Gertrude Stuart, Infant Child, of Walter J. Stuart, Deceased, Plaintiff,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON and WILLIAM V. JUDSON, Commissioners of the District of Columbia, Defendants.

To the Justice holding said Court:

Your relators, Helen Stuart and Helen Gertrude Stuart, her infant child, respectfully show unto the Court, as follows, to wit:

1. Your relator Helen Stuart is the widow and your relator Helen Gertrude Stuart is the infant child, under sixteen years of age, of Walter J. Stuart, deceased, who departed this life on June 28th, 1910. Said Walter J. Stuart was appointed December 14th, 1904, as a private in the Metropolitan Police Department of the District of Columbia and held such office until his death.

2. Upon the death of said Walter J. Stuart, as aforesaid, application was made to the defendants in behalf of your relators for the allowance of pensions to them from the Policemen's or Firemen's Fund of the District of Columbia under section 4 of the Act of Congress of March 1, 1905, which provides as follows:

"SEC. 4. That hereafter the Commissioners of the District of Columbia are hereby authorized and directed to deposit with the Treasurer of the United States, out of receipts from fines in the police court and receipts from dog licenses, a sufficient amount to meet any deficiency in the policemen's fund or firemen's fund; Provided, That the chief engineer of the fire department and all other officers 2 of said department of and above the rank of captain, the superintendent, assistant superintendent, any captain or lieutenant of police, in case of retirement as now provided by law, shall receive relief not exceeding one hundred dollars per month; and in case of death from injury or disease of any member of the police or fire department, if he be unmarried and leave a dependent mother, who is a widow the same shall be for her relief during the period of widowhood, or if he leaves a widow, or children under sixteen years of age, the same shall be for their relief during the period of widowhood, or until such children reach the age of sixteen years: Provided, That in no case shall the amount paid to such dependent mother, or widow exceed fifty dollars per month, nor shall the amount paid for a child exceed twenty-five dollars per month."

3. That thereafter the defendants found and held that your relators were not entitled to the pensions applied for and said application was thereupon denied by them.

4. On November 4th, 1910, a petition in behalf of your relators to the defendants for reconsideration by them of said application was denied by them and said application was finally rejected and said defendants refused to pay or cause to be paid to your relators any pension whatever from said Policemen's or Firemen's Fund.

5. Your relators are advised and believe and therefore aver that under said section 4 of said Act of Congress of March 1, 1905, your relator Helen Stuart, as the widow of said Walter J. Stuart, is entitled to a pension payable out of said Policemen's or Firemen's Fund, of not exceeding fifty dollars ($50) per month and that your relator, Helen Gertrude Stuart, as the infant child of said Walter J. Stuart, is entitled to a pension payable out of said fund of not exceeding twenty-five dollars ($25) per month; and that it is the duty of the defendants as Commissioners of the District of Columbia to fix the amounts of said pensions within the amounts aforesaid and to pay or cause to be paid the same from said Policemen's or Firemen's Fund aforesaid, and that in refusing the application aforesaid, they have committed a breach of their legal duty in the premises.

3 The premises considered, your relators pray as follows:

1. That the writ of mandamus issue from this Court commanding the defendants, as Commissioners of the District of Columbia, to grant to your relators as the widow and minor child of said Walter J. Stuart, late a private in the Metropolitan Police Department of the District of Columbia, a pension not exceeding fifty dollars ($50) per month to your relator Helen Stuart and twenty-five dollars ($25) per month to your relator, Helen Gertrude Stuart, payable out of the Policemen's or Firemen's fund of the District of Columbia.

2. And for such other and further relief as the Court may deem meet and proper in the premises.

HELEN STUART, *Relator.*

TUCKER, KENYON & MACFARLAND,
Attorneys for Relators.

DISTRICT OF COLUMBIA, *To wit:*

I, Helen Stuart, do solemnly swear that I have read the foregoing and annexed petition by me subscribed and know the contents thereof; that the facts therein stated upon my personal knowledge are true and those stated upon information and belief, I believe to be true.

HELEN STUART.

Subscribed and sworn to before me this ninth day of November, A. D., 1910.

[SEAL.]

EVA J. DOLAN,
Notary Public, D. C.

4 *Answer.*

Filed November 10, 1910.

In the Supreme Court of the District of Columbia, Holding a Law Term.

At Law. No. 53047.

UNITED STATES OF AMERICA ex Relatione HELEN STUART, Widow, and Helen Gertrude Stuart, Infant Child, of Walter J. Stuart, Deceased, Plaintiffs,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON and WILLIAM V. JUDSON, Commissioners of the District of Columbia, Defendants.

To the Supreme Court of the District of Columbia:

The answer of Cuno H. Rudolph, John A. Johnston and William V. Judson, Commissioners of the District of Columbia, to the petition of the relators, Helen Stuart and Helen G. Stuart, for a writ of mandamus against these respondents, respectfully shows to the Court:

1. These respondents admit that the relator Helen Stuart is the widow and Helen G. Stuart the infant child of Walter J. Stuart, deceased, and that the said Walter J. Stuart died on the 28th day of June, 1910. These respondents also admit that the said Walter J. Stuart was appointed a private in the Metropolitan Police Department of the District of Columbia on December 14, 1904, and they say that he never resigned the said office and was not dismissed therefrom.

2, 3, & 4. Answering paragraphs 2, 3, and 4 of the said petition your respondents show that pursuant to an order from the Major and Superintendent of Police Captain G. H. Williams was directed to report to the said Major and Superintendent of Police the facts concerning the death of the said Walter J. Stuart; that thereupon on,
5 to wit, July 10, 1910, the said Captain reported to the said Major and Superintendent that the said Walter J. Stuart, a member of the 4th precinct, Metropolitan Police, District of Columbia, shot himself twice in the left breast with a 32 caliber Colt Revolver, about 5:15 A. M., June 28th, 1910, while in bed at the 4th precinct station and died in the patrol wagon while enroute to the Emergency Hospital. Thereupon on July 11, 1910, the said Major and Superintendent of Police referred the said report to the Pension Board for consideration and report and by special order No. 21, on July 14, 1910, the Board was directed to convene on Tuesday July 19, 1910, at 2:00 o'clock P. M., to inquire into the following facts, under the provisions of an Act of Congress approved February 25, 1885:

1. Did W. J. Stuart, late Private in the Metropolitan Police Force of the District of Columbia, die from injuries received or disease contracted in the line of his duty as said Private?

2. Is Helen Stuart the lawful widow of the late W. J. Stuart?

3. Considering her age, physical condition and family, what amount of allowance, if any, should be granted her?

Thereupon said Retiring Board duly convened on said date to act on the application of the relator, Helen Stuart, who as the widow of the said Walter J. Stuart had petitioned the said Board to be granted an allowance from the Police Fund.

Thereupon the testimony of the said Helen Stuart was taken before the said Board and she was represented before said Board by counsel and it appeared from her testimony that from August 10, 1908, the said relator and her husband were living apart and that her husband had contributed the sum of thirty (30.00) Dollars a month for her support, by mutual agreement; that the said deceased had deserted the said relator and that thereupon further testimony was taken to show the cause of the death of the said Walter J. Stuart, and it appeared thereby that the said deceased had committed suicide and that the said suicide was not because of any reason con-
6 nected with the discharge of his duties as a police officer.

Thereupon the said Retiring Board in compliance with said special order, on, to wit, August 2, 1910, made the following report:

WASHINGTON, *August* 2, 1910.

Major Richard Sylvester, Supt. Metropolitan Police, D. C.

SIR: In compliance with Special Order No. 21, Exhibit "A" the Board convened and after considering the facts as set forth in Exhibits "B," "C" and "D" we find that the late Private Walter J. Stuart died from a gun shot wound of the chest, inflicted by himself with suicidal intent, and not in the line of duty.

In view of the fact that the late Private Walter J. Stuart did not die from injuries received or disease contracted in the line of duty as a policeman we recommend that no allowance from the Police Fund be made in this case.

Private Walter J. Stuart was appointed December 14, 1904, and committed suicide June 28th, 1910.

Very respectfully,

(Signed) HARRY L. GESSFORD, *Inspector.*
(Signed) MICHAEL BYRNES, *Captain.*
(Signed) CHARLES T. PECK, *Captain.*

which said report was on, to wit, August 5, 1910, duly referred to the Commissioners of the District of Columbia and was by them approved. Thereupon the relator, Helen Stuart, by her attorneys, requested these respondents as Commissioners as aforesaid to reconsider this report on the ground that it was not necessary that the death of a member of the police force be due to injuries or disease contracted in the line of duty, which said request was duly referred to the Corporation Counsel for advice, who, to wit, on the 31st day of October, 1910, advised these respondents that the finding of the said Retiring Board should not be disturbed, which said opinion was by these respondents approved.

These respondents are advised and therefore aver that the
7 relators are not entitled under the law to have or receive the pension applied for.

5. These respondents are advised that paragraph 5 of the petition of the relators sets out conclusions of law which they are not required to answer. They are, however, advised that it was and is their duty to decline to fix any amount of pension for the relators and to decline to pay or cause to be paid the same from the policemen's or firemen's pension fund and that they have discharged their legal duty by their action hereinbefore stated.

The respondents hereto attach and make a part hereof the Acts of Congress and the rules and regulations governing matters of police pensions.

And having fully answered they pray that the said petition may be dismissed.

CUNO H. RUDOLPH,
WM. V. JUDSON,
Commissioners of the District of Columbia.

E. H. THOMAS,
Attorney for Respondents.

Signature of Comm'r Johnston waived.
H. B. F. M.

DISTRICT OF COLUMBIA, *ss:*

We, Cuno H. Rudolph, John A. Johnston, and William V. Judson, do solemnly swear that we have read the foregoing and annexed answer by us subscribed and know the contents thereof and from official information we say that the matters or facts therein stated are true.

CUNO H. RUDOLPH.
WM. V. JUDSON.

Subscribed and sworn to before me this tenth day of November, A. D., 1910.

[SEAL.] WILLIAM TINDALL,
Notary Public, D. C.

8 EXHIBIT, PART OF ANSWER.

Acts of Congress.

Sections 361, 362, 363, and 364, Revised Statutes of the United States, Relating to the District of Columbia.

Act of February 25, 1885, 23 Stat. pages 316 and 317.
Act of June 11, 1896, 29 Stat. pages 104 and 405.
Act of February 28, 1901, 31 Stat. page 820.
Act of March 3, 1901, 31 Stat. page 1020.
Act of March 1, 1905, 33 Stat. page 821.
Act of March 31, 1906, 34 Stat. p. 95.
Act of March 9, 1908.
Act of May 26, 1908.

Rule passed by the Commissioners March 13, 1907, for the administration of the Police and Firemen's Relief Fund:

"That in all cases of retirement of members of the Police and Fire Departments, or the granting of pensions to widows, mothers, or children, that a retiring board be appointed to consider all cases where pensions are requested or deemed desirable; that in all cases of retirement of officers or members, the Board of Surgeons shall appear and state the physical condition of the officer or member, and whether or not said condition is due to injury received or disease contracted in line of duty, or that said officer or member has become so permanently disabled after service of fifteen years that he shall be discharged from service. If the Board of Surgeons is unable to be present to state their opinion, a written certificate must be submitted setting forth the condition. The proceedings of the retiring board shall be reduced to writing and the proceedings so conducted are to show the date of appointment, the age of the officer or member at the time of the injury, the record of the officer or member, and such other information as will enable said board to determine whether the applicant is entitled to the benefits of the Police or Firemen's pension funds, and in what amount. The retiring board shall make a written recommendation as to the retirement of the offi-

cer or member and the amount of pension, if any, to be granted, and all papers relating to the case after final action by the Commissioners to be filed in the Police or Fire Department with a copy of the Commissioner's order or their final action in the case."

9 *Demurrer.*

Filed November 10, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 53047.

UNITED STATES OF AMERICA ex Relatione HELEN STUART, Widow, and Helen Gertrude Stuart, Infant Child, of Walter J. Stuart, Deceased, Plaintiff,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON and WILLIAM V. JUDSON, Commissioners of the District of Columbia, Defendants.

Come now the relators by their attorneys and demur to the answer of the defendants in the above entitled cause and say that the same is bad in substance.

TUCKER, KENYON & MACFARLAND,
Attorneys for Relators.

NOTE.—Among the points of law to be argued in support of the foregoing demurrer is that under the statute in such case made and provided, it is the plain legal duty of the defendant to enroll the relators upon the Firemen's or Policemen's Pension Roll of the District of Columbia and to grant to each of them a pension therefrom.

10 In the Supreme Court of the District of Columbia.

At Law. No. 53047.

UNITED STATES OF AMERICA ex Relatione HELEN STUART, Widow, and Helen Gertrude Stuart, Infant Child, of Walter J. Stuart, Deceased, Plaintiff,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON and WILLIAM V. JUDSON, Commissioners of the District of Columbia, Defendants.

This cause coming on to be heard upon the petition for the writ of mandamus, the answer or return of the defendants thereto and the demurrer to said return, and having been argued and submitted to the Court by the attorneys for the respective parties, it is by the Court this 10th day of November, 1910,

Ordered that said demurrer be and the same is hereby sustained; and it is further ordered that the peremptory writ of mandamus

forthwith issue to the defendants as Commissioners of the District of Columbia commanding them to enroll the relators as pensioners upon the Firemen's or Policemen's Pension Roll of the District of Columbia as the widow and minor child of Walter J. Stuart, late a private in the Metropolitan Police Department of the District of Columbia, and to grant the relator Helen Stuart, as widow of said Walter J. Stuart, a pension payable therefrom of not exceeding fifty dollars ($50) per month and a pension payable therefrom to Helen Gertrude Stuart, as the infant child of said Walter J. Stuart, of not exceeding twenty-five dollars ($25) per month, until she reaches the age of sixteen years.

From this order the defendants in open court note an appeal to the Court of Appeals of the District of Columbia.

THOS. H. ANDERSON, *Justice.*

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 10, both inclusive, to be a true and correct transcript of the record, according to Rule Five (5) of the Court of Appeals of the District of Columbia, in cause No. 53047 at Law, wherein United States of America, ex relatione, Helen Stuart, widow, and Helen Gertrude Stuart, infant child of Walter J. Stuart, deceased, are Plaintiffs and Cuno H. Rudolph, John A. Johnston and William V. Judson, Commissioners of the District of Columbia, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 11th day of November, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2249. Cuno H. Rudolph et al., appellants, vs. U. S. of A. ex rel. Helen Stuart et al. Court of Appeals, District of Columbia. Filed Nov. 11, 1910. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2249.

No. 18, Special Calendar.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND WILLIAM V. JUDSON, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

UNITED STATES OF AMERICA *ex Relatione* HELEN STUART, WIDOW, AND HELEN GERTRUDE STUART, INFANT CHILD OF WALTER J. STUART, DECEASED.

BRIEF FOR APPELLEES.

CHARLES COWLES TUCKER,
HENRY B. F. MACFARLAND,
J. MILLER KENYON,
Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

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No. 18, Special Calendar.

CUNO H. RUDOLPH ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA *ex Rel.* HELEN STUART ET AL.

BRIEF FOR APPELLEES.

Statement of the Case.

The case is sufficiently stated in the brief for appellants.

ARGUMENT.

Progressive Legislation.

The most cursory examination of the various laws relating to pensions of policemen and firemen and dependent relatives in the District of Columbia (which are printed as an appendix to this brief in the order of their enactment), will

show a steady enlargement of their scope, and a steady increase in their liberality. The first provision, that in the Revised Statutes of the United States relating to the District of Columbia, sections 361 to 364, inclusive, relates only to policemen and provides only necessary expenses during the time of disability incurred in the actual discharge of duty, and from a limited fund, not including any appropriation from general revenues. The next act, that of February 25, 1885 (23 Stat., pp. 316 and 317), provided for increasing the fund by deducting one dollar each month from the pay of each policeman, and that the fund shall be used for the relief of any policeman who, *by injury received or disease contracted in the line of duty,* or after serving not less than fifteen years, shall become so permanently disabled as to be discharged from service therefor; and in case of his death from *such* injury or disease leaving a widow or children under sixteen years, for their relief with limitation of the total amount of relief to fifty dollars per month and a sum not exceeding seventy-five dollars to defray funeral expenses of any policeman dying in the service of the District, and further, providing similar relief for members of the fire department.

The next act, that of June 11, 1896 (29 Stat., p. 404), provides, evidently to meet the prospective additional demands due to increased generosity on the part of Congress, that out *of receipts from fines in the Police Court* the Commissioners shall deposit a sufficient amount to meet any deficiency in the policemen's fund or firemen's relief fund. In the same statute is an additional provision specially applying to the fire department only.

Five years later, in the act of February 28, 1901 (31 Stat., p. 820), Congress provided a large additional enlargement of the fund by directing that the Commissioners should, *out of receipts from fines in the Police Court, and receipts from dog licenses,* deposit a sufficient amount to meet any deficiency in the policemen's fund or firemen's fund, and then

provided that the chief engineer of the fire department, the superintendent, assistant superintendent, any captain or lieutenant of police in case of retirement as now provided by law, shall receive relief not exceeding one hundred dollars per month. Thus Congress increased to such beneficiaries the possible amount of pension from fifty dollars to one hundred dollars per month and then added, "And in case *of death from injury or disease* of any of the officers named in this section if he leave a widow or children under sixteen years of age, the same shall be for their relief during the period of widowhood or until such children reach the age of sixteen years, provided that in no case shall the amount paid to the widow exceed fifty dollars per month, nor the amount paid to the children exceed twenty-five dollars per month." This plainly gave to the superior officers of the police department an increase in the possible amount of pension, and to their widows and children under sixteen years of age a pension *in case of the death from injury or disease* of any of the officers named in this section, with the deliberate omission of the requirement of the act of February 25, 1885, which was the law until that time, that the death of the policeman must be due to *injury received or disease contracted in the line of duty.* There can be no question that this section 4 of the act of February 28, 1901, supersedes *pro tanto* the act of February 25, 1885, being repugnant to it.

The next act on the subject, that of March 3, 1901 (31 Stat., 1020), relates only to the fire department, and does not in any way change the provisions of the act of February 28, 1901.

Four years later, March 1, 1905, during which period there was full opportunity for a reconsideration of the policy which Congress had adopted with respect to the higher officers of the police department, Congress extended that policy by applying its principle to private members of the police and fire departments, in these words (act of March 1, 1905; 33 Stat., 821):

> "And in case *of death from injury or disease of any member* of the police or fire departments if he be unmarried and leave a dependent mother who is a widow the same shall be for her relief during the period of widowhood, or if he leave a widow or children under sixteen years of age, the same shall be for their relief during the period of widowhood or until such children reach the age of sixteen years, provided that in no case shall the amount paid to such dependent mother or widow exceed fifty dollars per month, nor shall the amount paid for the children exceed twenty-five dollars per month."

It will be observed that besides giving the widow and children under sixteen years a pension absolutely upon *the death from injury or disease* of a private in the police department, deliberately omitting the requirement of the act of February 25, 1885, that the *injury or disease should have been contracted in the line of duty,* which four years before had been stricken from the statute books in the interest of the higher officers of the police department, this act further extends the benefit of the pension system so as to include in the case of an unmarried member of the police or fire department the dependent mother, being a widow.

The two remaining statutes, that of March 31, 1906, and that of March 9, 1908, simply extend the provisions of the pension system so as to include additional beneficiaries and additional amounts of pension.

It is evident, therefore, that Congress has gradually, but steadily, with long intervals of time between its successive acts, deliberately extended the police pension system in the number of beneficiaries, in the amounts to be received, and especially, and particularly important in this case, with respect to the terms upon which pensions shall be given to widows, orphans, or dependent widowed mothers. It has consistently in this process also gradually increased the fund from which the pensions should be paid so as to cover all additional pensions that would be allowed by reason

of the enlargement of the system. Each act, so far as the police department is concerned, is distinctly more generous than its predecessor. The latest law repealing, by settled canons of statutory construction, the former acts so far as their provisions are repugnant, is clear and unambiguous in its terms, and leaves no doubt as to the intent of Congress.

Construction of Statutes.

When two acts upon the same subject are repugnant in any of their provisions the latter, without any repealing clause, acts to the extent of the repugnancy as a repeal of the first.

U. S. *vs.* Tynen, 11 Wall., 88.

Citing:

Davis *vs.* Fairbairn, 3 How., 636.
Bartlett *vs.* King, 12 Mass., 537.
Com. *vs.* Cooley, 10 Pick., 37.
Pierpont *vs.* Crouch, 10 Cal., 315.
Norris *vs.* Crocker, 13 How., 429; Sedgw. Stat. Law, 126.

A statute revising the whole subject of a former statute and intended as a substitute therefor, preserves all of the old law that is embraced therein and repeals all that is omitted without words to that effect. Murdoch *vs.* Memphis, 20 Wall., 590. In this case the court says:

> "The act of 1867 has no repealing clause nor any express words of repeal. If there is any repeal, therefore, it is one of implication. The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. It will be perceived by this statement

> that there is no repeal by positive new enactments inconsistent in terms with the old law. It is the words that are wholly omitted in the new statute which constitute the important feature in the questions thus propounded for discussion."

(After quoting the sections:)

> "A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. U. S. *vs.* Tynen, 11 Wall., 88 (78 U. S., XX 153); Henderson's Tobacco, 11 Wall., 652 (78 U. S., XX 235); Bartlett *vs.* King, 12 Mass., 537; Com. *vs.* Cooley, 10 Pick., 36; Sedg. Stat., 126."

When there are two acts upon the same subject they must stand together if possible; if the two are repugnant in any of their provisions the latter act operates as a repeal of the earlier one so far as, and only so far as, its provisions are repugnant to those of the earlier act.

> Board of Commissioners of Seward County, Kansas, *vs.* Ætna Life Insurance Company, 90 Fed., 222; 32 C. C. A., 585.

A plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a surmise or conjecture that the legislation did not actually contemplate or consciously intend its application thereto.

> Farmers Loan & Trust Co. *vs.* Oregon & C. Railway Co., 24 Fed., 407.

When the words of an act or part of an act are plain and clear, are not inconsistent with the general object and lead to no absurd results, the courts have no right to refuse their operation or to limit their effect by a construction based upon conjecture.

In re Drawbaugh, 3 App. D. C., 236.

Where the language of a statute is not clear, a court may well look at every part of it, at its title, and the mischief intended to be remedied in carrying it into effect, but if its language is clear it is not for the court to say that it shall be so construed as to embrace cases because no reason can be assigned for their exclusion.

Ohio National Bank *vs.* Berlin, 26 App. D. C., 218.

In construing a statute prior acts may be resorted to to solve, but not to create, an ambiguity.

Holden *vs.* U. S., 24 App. D. C., 318.

While repeal by implication is not favored, where the later enactment covers the whole subject-matter of the previous law and is plainly intended to prescribe the only rule that shall govern, repeal by implication is just as effective as express repeal.

Callen *vs.* District of Columbia, 2 App. D. C., 431.

Tracey *vs.* Tuhey, 134 U. S., 206.

Where the meaning of the Revised Statute is plain, the court will not recur to the original statutes to ascertain if errors were committed in the revision, but may do so to construe doubtful language.

Rathbone *vs.* Hamilton, 4 App. D. C., 475.

Same case on appeal.

Hamilton *vs.* Rathbone, 175 U. S., 414.

In the case of District of Columbia *vs.* Gant, 28 App. D. C., 185, this court held that it could not construe an act

of Congress making it a penal offense to sell provisions or produce for a weight less than the true weight to mean that it was an offense to sell provisions or produce for a weight more than the true weight.

And the Maryland Court of Appeals, in a similar case, said:

> "We have no power to change the words or to add provisions in order to make it (the statute in question) express what we may suppose to have been the intention of the legislature. If they have failed to express their real intentions, it is for them and not for the courts to amend the law and make it express the legislative will."
>
> Maxwell *vs.* State, 40 Md., 273-294.

Comment on Appellants' Brief.

In view of the foregoing it does not appear to be necessary to dwell long upon the points raised in the brief of the appellants which reflects the great intelligence, industry and ingenuity of the corporation counsel. Its elaborate reasoning, it is submitted, does not, in the light of what has already been said in this brief, apply to this case.

1. The doctrine of construction *in pari materia* is correctly set forth in the quotations from the text-books, but there is no obscurity, incoherency or ambiguity in the law, or any other reason to make application of this doctrine in the present case. The language of Congress is clear, and, as has been shown, the provision under which the appellees claim was first applied by Congress to the higher officers of the police and fire departments, and after an interval of four years was applied to the private members of the police and fire departments. There is an evident distinction between a system of laws and laws relating to a system; but, without dwelling on that distinction, it is equally evident that what might be called a system of laws relating to a system of

governmental actions may involve, as in this case, progressive development enlarging the scope and benefits of the system. An exact analogy for the present case is that of the National Government's system of laws for its system of pensions on account of the Civil War. Successive laws gradually enlarged the system so as to take in additional classes and to increase the amounts in particular classes, precisely as in the legislation of Congress for the pension system for the police and fire departments of the District of Columbia. No one has ever contended, and, of course, no decision of any court can be found to maintain, that because the Civil War pension system has been established and maintained and developed by numerous acts of Congress that the granting of pensions is to be restricted as to beneficiaries and amounts except according to the latest legislation. Congress acted in the same way in the case successively of the pensions due to the Revolutionary War, the War of 1812, and the War with Mexico.

The case cited, McCartee *vs.* Orphan Asylum Society, 9 Cowen, 437, on page 14 of appellants' brief, is easily distinguishable from the present case because it simply held that a private act of the legislature granting a charter to a corporation could not be held to repeal the statute of wills of the State, but must be construed in accordance with the public statute.

The case of Scott *vs.* Jersey City, 68 N. J., 689, 64 Atl., 441, cited on page 12 of appellants' brief, relates solely to the construction of two sections of the same statute, and obviously it does not apply to the repeal *pro tanto* of the provisions of one statute by a later one.

Diligent search fails to discover any case really analogous to the present case in which a later statute has not been held to repeal by implication the former statute in so far as the two were repugnant and where there is no obscurity, incoherency or ambiguity in the language of the later statute.

In the analysis of the statutes relating to pensions of the

fire and police departments of the District of Columbia, made on pages 7, 8, and 9 of appellants' brief, there is nothing to controvert the conclusions reached in this brief as to the effect of the acts of Congress. Congress, which under the Constitution exercises exclusive legislation over the District of Columbia, has full power to say who shall be the beneficiaries of the pension system of the fire and police departments of the District of Columbia, and upon what terms, and has exercised that power by its successive statutes, and no one can question its right to distinguish between officers and privates of the departments, or between the members of the two departments, or between dependent mothers and widows of deceased policemen. It has chosen to say in the early act of February 25, 1885, that members of the police department having served not less than fifteen years becoming so permanently disabled as to be discharged from service therefor are entitled to pensions whether the permanent disability was due to injury received or disease contracted in the line of duty or not. Thus it introduced the principle of giving a pension regardless of whether disability was due to injury received or disease contracted in the line of duty. In response to special appeals made to it in behalf of mothers of deceased members of the fire and police departments who died from injury or disease prior to March 1, 1905, the date of the first act that gave any pension to mothers, it provided in the act of March 31, 1906, that the provisions for such mothers should apply to those whose sons died prior to March 1, 1905. It never required in any act that pensions to mothers should depend on receiving or contracting in line of duty the injury or disease causing the death of the son upon whom the mother was dependent. These pension laws are all acts of grace, and the benefits conferred are to be taken as given to each class regardless of what provision is made for other classes, and without imputing inconsistency to the benefactor. Even if it were possible to consider these separate acts of Congress as one statute, a reason-

able construction of its terms would note recognition in the very beginning of the principle that a pension was to be given either for disability due to injury or disease contracted in the line of duty, *or to permanent disability after fifteen years' service unfitting for further service.*

2. As to the argument in appellants' brief, that because Policeman Stuart died by his own hand his widow and child should not receive pensions under any construction of the statutes.

A. While the appellants' brief assumes that Policeman Stuart committed suicide while sane, there is no allegation in the record that he was sane when he took his life. It is well settled law that the committing suicide while sane must be proved. It is not to be presumed, even under life insurance contracts, where an implied contract not to commit suicide is assumed if none is expressed. Typical decisions in the District of Columbia are, first, Casey *vs.* National Union, 3 App. D. C., where the court, by Chief Justice Alvey, said (page 516), the proof of the death of the insured having been given by the plaintiff and that all dues and assessments on the insurance policy had been fully paid: "The matter of defense was solely dependent upon the question whether the insured came to his death by willful or intentional suicide, effected by taking arsenical poison, and the onus of proof to support the affirmative of that question was entirely upon the defendant." Second, in the case of National Union *vs.* Bennet, 20 App. D. C., this court, by Chief Justice Shepard, said (page 533):

> "It is conceded that the plaintiffs made out a case entitling them to demand the return of a verdict unless successfully met and overcome by evidence in support of the defense of suicide. The burden was cast upon the defendant to show that the death of its deceased member was produced by his own intentional act."

An instructive and indeed a conclusive opinion is that of the Supreme Court of the United States in Accident Insurance Company *vs.* Crandal, 120 U. S., 527, where, in the case of a man found to have hanged himself while insane, the judgment of the Circuit Court in favor of his widow, to whom his accident insurance policy was payable, was affirmed, notwithstanding the proviso in the policy that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmity or disease or by suicide or self-inflicted injuries." The court says: "The decisions upon the effect of a policy of life insurance, which provides that it shall be void if the assured 'shall die by suicide,' or 'shall die by his own hand,' go far towards determining this question." * * * After quoting authorities: "In this state of the law there can be no doubt that the assured did not die 'by suicide' within the meaning of this policy; and the same reasons are conclusive against holding that he died 'by self-inflicted injuries.' If 'self-killing,' 'suicide,' 'dying by his own hand,' cannot be predicated of an insane person, no more can 'self-inflicted injuries'; for in either case it is not his act."

In conclusion the court holds that the death of the assured comes within the provision of the policy of insurance "against bodily injuries effected through external, accidental and violent means." "This sentence does not, like the proviso, speak of what the injury is 'caused by,' but it looks only to the 'means' by which it is effected. No one doubts that hanging is a violent means of death. * * * And, according to the decisions as to suicide under policies of life insurance before referred to, it cannot, when done by an insane person be held to be other than accidental. The result is that the judgment of the Circuit Court in favor of the plaintiff was correct and must be affirmed."

The elaborate and speculative structure of the argument to show that it is against public policy to construe the statute into an agreement by the legislature to pay pensions to the

family of a policeman who had committed suicide while sane falls to the ground upon the touch of these decisions. It may nevertheless be proper to point out that it is contradictory to all experience to believe that any one who was sufficiently sane to pass the physical examination required for admission to the police department would join the police force with the intention to commit suicide in order to obtain a pension for his family, and therefore that it is unnecessary to consider seriously the suggestion that Congress did not intend to place a premium on suicide. Also it should be remembered that in the present case the policeman was appointed December 14, 1904, and died June 28, 1910—five years and six months later.

B. But, assuming that the appellants had alleged that Stuart committed suicide while sane, it would not necessarily follow that his widow and child should be deprived of a pension provided for them by law. A pension is not a contract. The law of contracts does not apply to it. As this court said in Macfarland *vs.* Bieber, 32 App. D. C., 521, "A pension is not granted because of any property right the pensioner has or may acquire in it, but is an act of gratuity from the bounty of the Government."

It is not at bottom for the benefit of the policeman, or even for the benefit of his family, but for the benefit of the service and of the community by inducing suitable men to take the hazardous and wearing duty of the policeman.

But even in the matter of life insurance policies, which furnish all the known decisions of the courts on the effect upon contracts of suicide while sane, a distinction is made by the courts between life insurance contracts payable (as in the case cited in appellants' brief, Ritter *vs.* Mutual Life Insurance Company, 169 U. S., 139, 151, 154) to the insured, his *executors, administrators, or assigns,* and those where the policy is payable to the widow.

Where a life insurance policy is silent as to suicide it will

not for such act be void as against the wife of the insured who is named its beneficiary:

> "We are not called upon to decide what would have been the effect on the contract if the policy itself had been payable to the insured or to his personal representatives, as in Runk's Executors *vs.* Insurance Company, 70 Fed., 954" (the same case as Ritter *vs.* Mutual Life Insurance Company, 139 U. S.).
>
> Morris *vs.* State Mutual Life Association of Worcester, Massachusetts, 39 Atl., 52 (Pa.).

> "The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch, the insured, but of his wife and children * * * they were not bound by any acts or declarations done or made by him after the issue of the policy unless such acts were in violation of some condition of the policy."
>
> Fitch *vs.* Insurance Co., 59 N. Y., 557.

> "We are clearly of the opinion that the weight of authority is to the effect that, where the policy is silent as to suicide, it will not for such act be void as against the wife of the deceased who is named as beneficiary."
>
> Barrow *vs.* Society, 116 N. Y., 537.

The principle of the decisions is that it is not against public policy to require payment to the widow, but that it would be to require payment to be made to executors, administrators, or assigns as representing the deceased who violated his contract.

This principle is most clearly presented in the opinion of the Supreme Court of Iowa, in 1898, in Seiler *vs.* Economic Life Association, 105 Iowa, 87, which also distinguished and thoroughly analyzed the Ritter case, the only one which it considered even apparently inimical to the doctrine. "In the Ritter case," says this opinion, "the action was brought

by the personal representative of the assured, whose claims had to be made through the wrongdoer, while here the suit is instituted by beneficiaries named in the policy and who claim in their own right." It also quotes from the Ritter opinion where, in commenting on an expression used in another case, Mr. Justice Harlan said, "This observation was irrelevant to the case before the court and cannot be regarded as determining the point in judgment. If it was meant there should be a recovery by *the personal representative* * * * we cannot concur in that view." The Iowa opinion proceeds: "Another and convincing reason for thinking that the doctrine announced in the Ritter case was not intended to go further than to deny a right to recovery of the personal representative of the assured is that not one of the several cases in which beneficiaries named in the contract have been held entitled to recover was mentioned in that opinion."

It then cited Fitch *vs.* Insurance Company, Darrow *vs.* Society, cited *supra,* and Kerr *vs.* Association, 39 Minn., 174.

In discussing the opinion in the Ritter case the Iowa court says that the language quoted in the Ritter opinion from Lord Campbell (Moore *vs.* Woolsey, 4 El. & Bl., 243) was *obiter,* and quotes further from Lord Campbell's opinion what was law, and which was not quoted in the Ritter opinion, as follows: "But where a man insures his own life we can discover no illegality in a stipulation that if the policy should afterwards be assigned, *bona fide,* for valuable consideration it might be enforced for the benefit of others whatever may be the means of his death. * * * The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which a lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind." If public policy does not stand in the way of a recovery by an assignee we can discern

no reason why it should in the case of a beneficiary named in the contract.

It is evident that the facts in Ritter *vs.* Mutual Life Insurance Company (which are cited on page 11 of appellants' brief) bear no analogy whatever to the facts in the present case, even assuming what cannot properly be assumed, that Stuart committed suicide while sane.

C. It is difficult to see how any such construction could be put upon the plain English words "injury or disease" as is suggested in appellants' brief. It is a case of death by suicide due to both disease and injury, for it must be assumed in the absence of proof to the contrary that Stuart was insane. But if it had been found that he was sane, the death was certainly due to injury. A self-inflicted injury, it is true, but nevertheless an injury. If he had been shot by another and died as a result, no question would have been raised that his death was due to injury, or if he had died as a result of insanity that his death was due to disease.

There is no allegation in the record as to a long-time construction claimed by appellants' brief to have been given by the Commissioners of the District of Columbia to the law in question, but no such construction could stand for a moment against the positive language of the statute. As stated by the Supreme Court of the United States in Houghton *vs.* Payne, 194 U. S., 88, it is only when the language of a statute is ambiguous and susceptible of two reasonable constructions that weight is given to the doctrine of contemporaneous construction. A custom of an executive department, though long continued by successive officers, must yield to the positive language of a statute. It must be said that the Commissioners have adopted a misconstruction of the law as to this case in the face of the decision of the Supreme Court of the District of Columbia, October term, 1908, in the similar case of Nellie F. Fletcher *vs.* District of Columbia, in which the writ of mandamus was issued re-

quiring the Commissioners of the District of Columbia to place on the pension roll the name of the applicant, with which decision the Commissioners complied without appeal to the Court of Appeals. In that case the court held that, on application for a pension by the widow of a policeman, it is not necessary that the death of the policeman be due to injury or disease contracted in the line of duty. This precedent was followed by the Supreme Court in the present case.

It is believed in conclusion that the decision of the court below should be affirmed, and that the writ of mandamus should issue in order that the Commissioners of the District of Columbia may comply with the plain intent of Congress, as expressed in the latest statute on the subject, which does not require that the injury or disease from which Policeman Stuart died was received or contracted in the line of duty in order to give pensions to his widow and child.

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APPENDIX.

Memorandum of Various Laws Relating to the Police Relief Fund and Firemen's Relief Fund, D. C.

Revised Statutes of the United States Relating to the District of Columbia.

"SEC. 361. All fines imposed by the board of police upon members of the police force, by way of discipline, and collectible from pay or salary, and all rewards, fees, proceeds of gifts, and emoluments, that may be paid and given for extraordinary services of any member of the police force, except when allowed to be retained by such member, shall be paid to the treasurer of the board of police, unless otherwise appropriated by the board.

"SEC. 362. The rewards, fees, proceeds of gifts, and emoluments mentioned in the preceding section, and all moneys arising from the sale of unclaimed goods, shall constitute the 'policeman's fund.'

"SEC. 363. The board of police shall be the trustee of the policeman's fund, and may invest the same as they shall see fit.

"SEC. 364. Whenever any member of the police force, in actual discharge of his duties, shall become actually disabled, his necessary expenses, during the time of such disability, on the certificate of a competent surgeon, stating the manner, cause and condition of the injury, and approved by the board of police, may become a charge upon the policeman's fund. But the board may discontinue such allowance for any satisfactory reason."

Act of February 25, 1885, 23 Stat., pp. 316 and 317:

"*Provided,* That hereafter the Commissioners shall deduct one dollar each month from the pay of each policeman, which sum so deducted shall be added to and form a part of the present police fund, to be invested in United States or District bonds by the Treasurer of the United States, and be held by him subject to the drafts of the Commissioners for

expenditures made in pursuance of law, and such expenditures shall be accounted for as required by law for other expenditures of the District; and said police fund shall be used for the relief of any policeman, who, by injury received or disease contracted in line of duty, or having served not less than fifteen years, shall become so permanently disabled as to be discharged from service therefor; and in case of his death from such injury or disease, leaving a widow or children under sixteen years, for their relief: *Provided further,* That such relief shall not exceed for any one policeman or his family the sum of fifty dollars per month; and a sum not exceeding seventy-five dollars may be allowed from said fund to defray the funeral expenses of any policeman dying in the service of the District."

Page 317:

"*Provided,* That hereafter the Commissioners shall deduct one dollar each month from the pay of each fireman, which sum so deducted shall be kept as a firemen's relief fund, and be invested in United States or District bonds and held in manner provided in this act for the police fund, and shall be used for the relief of any fireman who, by injury received or disease contracted in line of duty, or having served not less than fifteen years, shall become so permanently disabled as to be discharged from service therefor; and in case of his death from such injury, or disease, leaving a widow or children under sixteen years of age, for their relief: *Provided, further,* That such relief shall not exceed for any one fireman or his family the sum of fifty dollars per month; and a sum not exceeding seventy-five dollars may be allowed from said fund to defray the funeral expenses of any fireman dying in the service of the District."

Act of June 11, 1896, 29 Stat., p. 404:

"*Provided,* That hereafter the Commissioners of the District of Columbia are hereby authorized and directed to deposit with the Treasurer of the United States, out of receipts from fines in the police court, a sufficient amount to meet any deficiency in the police fund or the firemen's relief fund."

Page 405:

"*Provided,* That hereafter the Commissioners of the District of Columbia shall deduct one dollar per month from the pay of each fireman, which sum so deducted shall be kept as a firemen's relief fund, and be invested in United States or District bonds, and held in the manner provided by existing law in respect to the policemen's fund, and shall be used for the relief of any fireman who, having served not less than twelve months, shall by reason of injuries received or disease contracted in the line of actual fire duty, going to, at, or returning from a fire, or having served not less than fifteen years, shall become so permanently disabled as to be discharged from service therefor; and in the case of the death of such fireman from such injury or disease, leaving a widow or children under sixteen years of age, for their relief: *Provided,* That no fireman shall be entitled to any of the benefits of this relief fund who may by reason of his own indiscretion bring on any injury or disease which may incapacitate him from the performance of his duties, as a member of the fire department, or who shall be retired for such cause or causes: *Provided further,* That such relief shall not exceed, for any one fireman or his family, the sum of fifty dollars per month; and a sum not exceeding seventy-five dollars may be allowed from such fund to defray the funeral expenses of any fireman dying in the service of the District."

Act of February 28, 1901, 31 Stat., p. 820:

"SEC. 4. That hereafter the Commissioners of the District of Columbia are hereby authorized and directed to deposit with the Treasurer of the United States, out of receipts from fines in the police court and receipts from dog licenses, a sufficient amount to meet any deficiency in the policemen's fund or firemen's fund: *Provided,* That the chief engineer of the fire department and the superintendent, assistant superintendent, any captain or lieutenant of police, in case of retirement as now provided by law, shall receive relief not exceeding one hundred dollars per month; and in case of the death from injury or disease of any of the officers named in this section, if he leave a widow or children under sixteen years of age, the same shall be for their relief during the period of widowhood, or until such children reach the age of sixteen years: *Provided,* That in no case shall the amount

paid to a widow exceed fifty dollars per month, nor shall the amount paid for a child exceed twenty-five dollars per month."

Act of March 3, 1901, 31 Stat., 1020:

"The provisions contained in the act of Congress approved June eleventh, eighteen hundred and ninety-six, relating to the firemen's relief fund, may, within the discretion of the Commissioners of the District of Columbia, be extended to and used for the relief of any fireman, or his family, although he may not heretofore, or hereafter, have served twelve months."

Act of March 1, 1905, 33 Stat., p. 821:

"SEC. 4. That hereafter the Commissioners of the District of Columbia are hereby authorized and directed to deposit with the Treasurer of the United States, out of receipts from fines in the police court and receipts from dog licenses, a sufficient amount to meet any deficiency in the policemen's fund or firemen's fund: *Provided,* That the chief engineer of the fire department and all other officers of said department of and above the rank of captain, the superintendent, assistant superintendent, any captain or lieutenant of police, in case of retirement as now provided by law, shall receive relief not exceeding one hundred dollars per month; and in case of the death from injury or disease of any member of the police or fire department, if he be unmarried and leave a dependent mother, who is a widow, the same shall be for her relief during the period of widowhood, or if he leave a widow, or children under sixteen years of age, the same shall be for their relief during the period of widowhood, or until such children reach the age of sixteen years: *Provided,* That in no case shall the amount paid to such dependent mother, or widow exceed fifty dollars per month, nor shall the amount paid for a child exceed twenty-five dollars per month."

Act of March 31, 1906, 34 Stat., p. 95:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this act the provision of the act approved March first, nineteen hundred and five, entitled 'An act to amend section four of an act entitled "An act re-

lating to the Metropolitan police of the District of Columbia," approved February twenty-eighth, nineteen hundred and one,' for the relief, during widowhood, of dependent mothers of unmarried deceased members of said Metropolitan police force and of unmarried deceased members of the fire department of said District, shall include such mothers of any such deceased member of said police force and of said fire department who have died from injury or disease prior to March 1, 1905."

Act of March 9, 1908:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act of Congress approved March first, nineteen hundred and five, entitled 'An act to amend section four of an act entitled "An act relating to the Metropolitan police of the District of Columbia," ' is hereby amended by extending its provisions in behalf of the chief engineer of the fire department and all other officers of said department of and above the rank of captain, to any chief engineer of the fire department and all other officers of said department of and above the rank of foreman, who were retired and pensioned in pursuance of law prior to the approval of said act: *Provided*, That when retired the present chief engineer of the fire department of the District of Columbia shall receive as retired pay a sum equal to one-half of the salary allowed by law at date of retirement."